

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRONE MATHIS,	§
	§ No. 147, 2010
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 0609019779
	§
Plaintiff Below-	§
Appellee.	§

Submitted: April 19, 2010

Decided: June 2, 2010

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 2<sup>nd</sup> day of June 2010, upon consideration of the appellant's opening brief and the appellee's motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The defendant-appellant, Tyrone Mathis, filed an appeal from the Superior Court's March 3, 2010 order adopting the Superior Court Commissioner's February 15, 2010 report, which recommended that Mathis' postconviction motion pursuant to Superior Court Criminal Rule 61 be denied.<sup>1</sup> The plaintiff-appellee, the State of Delaware, has moved to affirm

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<sup>1</sup> Del. Code Ann. tit. 10, §512(b); Super. Ct. Crim. R. 62.

the Superior Court's judgment on the ground that it is manifest that the appeal is without merit.<sup>2</sup> We agree and affirm.

(2) In April 2007, Mathis was found guilty by a Superior Court jury of two counts of Robbery in the First Degree and two counts of Possession of a Deadly Weapon During the Commission of a Felony. The evidence at trial was that, on September 27, 2006, Mathis, wielding a knife, separately threatened and demanded money from two employees of a Burger King restaurant in New Castle County, Delaware. Mathis was sentenced to 25 years at Level V incarceration, to be suspended after 5 years for decreasing levels of supervision on each of his robbery convictions and to 2 years at Level V incarceration on each of his weapon convictions. Mathis' convictions and sentences were affirmed by this Court on direct appeal.<sup>3</sup>

(3) In this appeal from the Superior Court's denial of his postconviction motion, Mathis claims that a) he was improperly charged with, and convicted of, two counts of first degree robbery and two weapon counts; and b) his attorney provided ineffective assistance by failing to file a timely motion to suppress the show-up identification of Mathis by the robbery victims.

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<sup>2</sup> Supr. Ct. R. 25(a).

<sup>3</sup> *Mathis v. State*, Del. Supr., No. 516, 2007, Ridgely, J. (May 19, 2008).

(4) Rule 61 provides that a formerly adjudicated claim is thereafter barred unless reconsideration is warranted in the interest of justice<sup>4</sup> or unless there has been a miscarriage of justice.<sup>5</sup> The record reflects that Mathis' first claim was formerly adjudicated in his direct appeal. As such, it is procedurally barred unless Mathis can demonstrate that reconsideration of the claim is warranted in the interest of justice or that there has been a miscarriage of justice. Because, under Delaware law, a defendant may be separately charged and punished for multiple counts of robbery where the evidence supports separate and distinct acts constituting the crime of robbery, without implicating double jeopardy,<sup>6</sup> Mathis' claim of error is without merit and he cannot avoid the procedural bar. As such, the Superior Court properly denied Mathis' first claim.

(5) Mathis' second claim is that his counsel was ineffective for failing to file a timely motion to suppress.<sup>7</sup> The record reflects that Mathis' counsel filed a motion to suppress Mathis' out-of-court identification on the eve of trial and the Superior Court refused to consider it on the ground that there were no "exceptional circumstances" warranting its consideration.<sup>8</sup>

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<sup>4</sup> Rule 61(i)(4).

<sup>5</sup> Rule 61(i)(5).

<sup>6</sup> *Washington v. State*, 836 A.2d 485, 487-91 (Del. 2003).

<sup>7</sup> *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

<sup>8</sup> *Pennewell v. State*, Del. Supr., No. 410, 2002, Veasey, C.J. (Apr. 29, 2003) (citing *Barnett v. State*, 691 A.2d 614, 616 (Del. 1997)).

The record also reflects that Mathis claimed in his direct appeal that the Superior Court erred by failing to consider the motion to suppress. In its Order affirming Mathis' conviction, this Court held that, even assuming error on the part of the Superior Court in refusing to consider the motion to suppress, such error was harmless beyond a reasonable doubt given the weight of the other evidence supporting Mathis' conviction. Under these circumstances, there is no basis for Mathis' claim that his counsel's error resulted in prejudice to him.<sup>9</sup> As such, the Superior Court also properly denied Mathis' second claim.

(6) It is manifest on the face of the opening brief that the appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, there was no abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.<sup>10</sup>

BY THE COURT:  
/s/ Henry duPont Ridgely  
Justice

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<sup>9</sup> *Skinner v. State*, 607 A.2d 1170, 1173 (Del. 1992) (this Court's rejection of the defendant's substantive claims on direct appeal precluded a showing of prejudice on the defendant's subsequent claim of ineffective assistance of counsel).

<sup>10</sup> Although the Superior Court incorrectly held that Mathis' postconviction motion was time-barred under Rule 61(i)(1), this Court may properly affirm the Superior Court's judgment on alternative grounds. *Unitrin, Inc. v. Amer. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).